Before the

# Federal Communications Commission

Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 309(j) | ) | MM Docket No. 97-234 |
| of the Communications Act | ) | |
| -- Competitive Bidding for Commercial | ) | |
| Broadcast and Instructional Television | ) | |
| Fixed Service Licenses | ) | |
| | ) | |
| Reexamination of the Policy | ) | GC Docket No. 92-52 |
| Statement on Comparative | ) | |
| Broadcast Hearings | ) | |
| | ) | |
| Proposals to Reform the Commission's | ) | GEN Docket No. 90-264 |
| Comparative Hearing Process to | ) | |
| Expedite the Resolution of Cases | ) | |

TO: The Commission

## REPLY COMMENTS OF LINEAR RESEARCH ASSOCIATES

Linear Research Associates ("Linear"), by counsel, hereby replies to comments submitted in response to the *Notice of Proposed Rulemaking*, FCC 97-397, released November 26, 1997 ("*NPRM*") in the captioned proceeding.[1]

1. *Introduction.* Linear's opening comments addressed the procedures the Commission should apply to pending applications filed prior to July 1, 1997 for which a joint settlement agreement among *qualified* applicants is before the FCC, as well as a motion to dismiss any unqualified applicant. In that event, the FCC should deem that

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[1] 62 Fed. Reg. 65392 (Dec. 12, 1997).

a "viable settlement" has been reached, and act swiftly to dispose of the unqualified applicant.

Linear illustrated the effectiveness of a "viable settlement" rule by reference to the Ithaca, New York television proceeding, in which Linear, Kevin O'Kane, and William Smith were applicants for a new facility on Channel 52. Over 17 months ago -- on July 10, 1996 -- Linear and O'Kane filed a Joint Petition to Dismiss or Deny Smith's application, predicated on several fundamental defects that render the Smith application non-grantable.

In December 1996, Linear and O'Kane filed a Joint Request for Approval of Settlement Agreement that contemplated the amendment of O'Kane's application to substitute as the Ithaca applicant a corporation owned by O'Kane and Linear. The Settlement Agreement was initially contingent on the *dismissal* of the Linear *and Smith* applications, and the grant of O'Kane's application as amended. (Last month, the parties amended the Joint Request for Approval of Settlement Agreement to report that they had completed the merger of the O'Kane and Linear applications, thus removing the contingent aspects of the settlement with regard to the dismissal of the Linear application.) All that is required in order to bring Ithaca its first local television service (something it has lacked for over fifteen years since applications were first filed for Channel 52) is approval of the settlement and dismissal of the Smith application.

The pleadings Linear and O'Kane filed against Smith's application demonstrate,

*inter alia*, that Smith certified reasonable assurance of the availability of his proposed antenna site when, in fact, the tower owner had given no such assurance. Two representatives of the tower owner executed declarations under penalty of perjury averring that the tower owner had *not* given Smith any assurance as to the availability of the tower, and that neither Smith nor anyone acting on his behalf had inquired with the tower owner as to that prospect.

2. *The FCC's Proposal To Eliminate the Site Certification Requirement.* At Paragraph 81 of the *NPRM*, the FCC tentatively proposes "to eliminate the requirement that applicants certify they have a 'reasonable assurance' that the specific sites proposed as the location of their transmitting antennas will be available." Rather than site certifications, the Commission would "rely on strict enforcement of our existing construction requirements to ensure that winning bidders in future broadcast auctions construct their facilities in a timely manner," noting that the same procedure has been adopted in MMDS. *NPRM* n. 42.

The majority of those commenters responding to the FCC's proposal to abolish site certifications urged that it *not* be adopted.[2] Linear wholeheartedly agrees. For a variety of reasons, elimination of the site certification requirement would be ill-advised.

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[2] *See, e.g.*, Comments of: Rio Grand Broadcasting Company, at 17; Six Video Broadcast Licensees, at 7; Independent Broadcast Consultants, Inc., at 5; Communications Technologies, Inc., at 3; Positive Alternative Radio, Inc. Et Al., at 6; Todd Stuart Noordyk, at 5; Batesville Broadcasting Company, Inc., at 5; Tri-County Broadcasting, Inc., at 4, 5; Jacor Communications, Inc., at 6; The Association of Federal Communications Consulting Engineers, pgs. 1-5, John Anthony Bulmer, at 3; Michael R. Ferrigno, at 9; Hatfield & Dawson Consulting Engineers, at 2; Jeffrey N. Eustis, at 2 and Donald James Noordyk, at 5.

A. *Considerations specific to pre-July 1, 1997 applicants*. First, with respect to any pre-July 1, 1997 applicants, the retroactive repeal of the site certification policy would unfairly prejudice applicants (such as Linear and O'Kane) who expended time, money, and other resources in order to comply with the stringent requirements of the current rule. Their good faith reliance on the procedures extant at the time their applications were filed establishes a genuine reliance interest. *See, e.g., Boston Edison v. Federal Power Comm'n*, 557 F.2d 845 (D.C. Cir. 1977).

By the same token, for applicants such as Smith, who have shown their willingness to flout basic FCC rules, evidence of that proclivity cannot be ignored or extinguished by a retroactive repeal of the site certification rule. Such evidence, where it has already come to light, bears on an applicant's character qualifications. It would disserve the public interest for the FCC to discard evidence of the disposition of a potential licensee to be a reliable and trustworthy steward, on the one hand, or to prevaricate for its private advantage, on the other.

Accordingly, whatever the ultimate outcome of the proposal to eliminate site certifications, in no event should the rule change be given retroactive applicability so as to effectively exonerate an applicant who has violated the current rule by falsely certifying the availability of its site.

B. *General considerations*. Moreover, in the broadcast services, a valid transmitter site is the *sine qua non* of an applicant's technical proposal, and is often

the most difficult step in the process of creating a grantable application. If the site certification requirement is discarded, an aggressive bidder could propose a tower location virtually anywhere -- authorized or not -- and the FCC presumably would grant the application if it otherwise complied with the rules. The absence of the requirement would invite the sort of abuse that the FCC purports to avoid whenever it repeals rules in the name of parsimony, administrative efficiency or paperwork reduction. Here, the advantage of simplifying the application process cannot seriously be deemed to outweigh the abuses that would surely follow -- abuses long held to be contrary to the public interest.

Aside from this prudential reason for preserving the rule, the elimination of the certification requirement may well be legally problematic. Section 308(b) of the Communications Act requires that "[a]ll applications for station licenses, . . . shall set forth such facts as the Commission by regulation may prescribe as to the . . . technical and other qualifications of the applicant to operate the station." Because site availability is such an essential dimension of any *bona fide* technical proposal, the repeal of the certification requirement -- without any obvious public interest benefit -- may well exceed the FCC's proper statutory authority.

That misstep would not be unlike the FCC's ill-fated construction of the Act's petition to deny procedure, castigated by the Court of Appeals in *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988). There, the

Commission's error lay in its reading out of the Act a fundamental dimension of the agency's responsibility to regulate in the public interest. As the Court held, the statute effectively requires the agency to "look for fire when it is shown a good deal of smoke." The Commission's failure to do so constituted reversible error. The Commission risks committing a similar lapse of its regulatory duty -- by licensing applicants who are not technically qualified -- if it adopts the *NPRM*'s proposal to eliminate site certifications.

The FCC's proposal is all the more problematic because the approach it offers as a substitute to certification -- strict enforcement of construction deadlines -- is not a valid alternative. The case will often arise, because of the unique nature of acquiring a broadcast antenna site, that unexpected delays (such as zoning approvals) will impede a wholly *bona fide* permittee from timely construction. In that event, the "strict enforcement" of construction deadlines would only shift the penalty of delay to the wrong party. This particular feature of a broadcast applicant's proposal distinguishes the MMDS context cited by analogy in the *NPRM*. In MMDS and other super high frequency services, relatively small antennas (as compared with broadcast operations) on relatively short towers are typically used. Thus, the antenna technology encountered in MMDS is such that the logistical obstacles confronting broadcasters are ordinarily not in play.

3. *Conclusion.* For the above reasons, Linear supports the sound position that the FCC should retain the current requirement that broadcast applicants certify the availability of their proposed transmitter sites, particularly as to applications which have already been filed on FCC Form 301.

Respectfully submitted,

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